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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 258

MORRIS H. KRAMER,

Appellant,

v.

UNION FREE SCHOOL DISTRICT NO. 15, RAYMOND S. BARON, JESSE CESTARI, RALPH J. EDSEL, J. GIBSON FRUIN, HARDON DEIXEL, ELLIOT A. NORWALK, and HAROLD S. ROSENFELD,

Appellees,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION BY NEW YORK ATTORNEY GENERAL TO DISMISS OR AFFIRM

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The Attorney General of the State of New York, an intervenor (pursuant to New York Executive Law § 71) in this litigation since its inception, moves, pursuant to Rule 16 of the Revised Rules of this Court, to dismiss

this appeal on the ground that the appeal is not within the jurisdiction of this Court, or in the alternative, to affirm—on the ground that the question sought to be presented is so insubstantial as not to merit argument.

Question Presented

The question presented is whether New York Education Law § 2012, which restricts the right to vote in school district elections to persons *in loco parentis* and to classes of persons most directly subject to school district taxes, violates the Equal Protection Clause of the Fourteenth Amendment.

Statement

The statement contained in the appellant's jurisdictional statement is substantially correct, except for the fact that it does not note that the opinions below have been officially reported. 282 F. Supp. 70.

Further, subdivision (a) of the statute challenged (Jur. St., p. 3) has been amended to permit spouses, other than those of owners of real property, to vote in school district elections. See L. 1968, ch. 730 (quoted *infra*, p. 5), extending further the spouses' right to vote previously added by L. 1956, ch. 497).

The Question Is Not Substantial

The appellant concedes (p. 7) that the States need not provide for the election of school boards. *Sailors* v. *Board of Education*, 387 U. S. 105 (1967); but insists (p. 7) that elections of school boards having been provided for in certain localities in New York, this Court's decisions in *Carrington* v. *Rash*, 380 U. S. 89 (1965) and *Harper* v. *Virginia State Board*, 383 U. S. 663 (1966), have abrogated

any standards of "rationality" that may be employed by New York or any other State in classifying persons eligible to vote in a school district election.

The appellant has overstated his case. In *Carrington*, the majority explicitly recognized that Texas had "unquestioned power to impose reasonable residence restrictions on the availability of the ballot" (380 U. S. 89, 91). This Court merely held it to be an *invidious discrimination* for Texas to provide that no serviceman could ever acquire a voting residence in the State so long as he remained in service (380 U. S. 89, 92, 96). Indeed, the majority of this Court took pains to "emphasize that Texas is free to take reasonable and adequate steps, as have other States, to see that all applicants for the vote actually fulfill the requirements of bona fide residence" (380 U. S. at p. 96).

In *Harper* (*supra*), this Court held a poll tax to be unconstitutional. The "affluence of the voter or payment of any fee" were held to be inappropriate standards which bore no relation to voter "qualifications" and were offensive, as "invidiously discriminating" against those persons required to demonstrate such affluence or to pay such fee (383 U. S. 663, 666, 667). But the Court recognized that the States still had an interest in fixing qualifications which were "germane to one's ability to participate intelligently in the electoral process" (383 U. S. at p. 668).

What the appellant has failed to observe with reference to "qualifications" is that there is a very reasonable relationship, in the categories of "interest" established under Education Law § 2012 of the persons permitted to vote for the members of the school board, to the administrative functions of a local school board. Those permitted to "have a voice" in the election are those whom the State could understandably deem to be the most intimately interested in actions taken by the school board—1) the parents of children attending school in the district, and 2) the real

estate owners and lessees "liable to taxation for school purposes."

This is not a "one man, one vote" case, one involving a vote dilution problem; but a "qualification" case involving intensity or depth of interest as a proper standard for the qualification of a voter in the election of local officials performing an administrative task of special interest to those qualified voters. In *Sailors* v. *Board of Education*, 387 U. S. 105, 111, this Court observed that a State could appoint such officials or elect them or combine the elective and appointive systems. In this "right to vote" case, there appears to be no basis for challenging the reasonableness of election standards which restrict that right to those persons most directly affected and those deemed to be most directly concerned by the actions of the local administrative body. Indeed, this Court, in sustaining a *residence* requirement as a reasonable type of election "qualification", has demonstrated the propriety of State action in insisting upon an intimacy of interest in the subject matter of an election, as a basis for classification. *Pope* v. *Williams*, 193 U. S. 631, 632 (1904); *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, 51 (1959). Furthermore, no substantial federal question was found to exist even where the classification of persons permitted to vote in a municipal election was extended to *non-resident* owners of real property in the municipality. *Spahos* v. *Mayor and Councilmen of Savannah Beach*, 207 F. Supp. 688 (So. Dist., Ga., 1962), aff'd *per curiam* 371 U. S. 206 (1963); and see *Glisson* v. *Mayor and Councilmen of Town of Savannah Beach*, 346 F. 2d 135 (5th Circ., 1965). The broad and pervasive general interest of all United States residents and citizens in the subject of education does not and need not, however, make all such residents and citizens eligible to vote in every local school district election.

The 1967 New York Constitutional Convention, whose work was rejected by the voters of the State, proposed a

broad reclassification (Article II) of the rights of persons to vote in various types of elections throughout the State, including school board elections. But the 1967 voter response, rejecting the entire product of the Convention submitted to it on a take-it-or-leave-it-all basis, did not and does not prevent the Legislature from exercising its wisdom to readjust the classifications of voters it deems entitled to vote in school district elections. See Report No. 4 dated March 4, 1967, entitled "The Right to Vote", prepared by the Temporary State Commission on the Constitutional Convention. Indeed, by L. 1968, ch. 730, effective June 16, 1968, the right to vote in school district elections has been extended, during the pendency of this action, to the "spouse of one who leases, hires or is in possession under a contract of purchase".

It should be noted, finally, that the dissenting District Judge had (prior to his dissent in this case) written (Weinstein, "The effect of the federal reapportionment decisions on counties and other forms of municipal government", 65 Col. L. Rev. 21, 35), the following:

> "There remain, however, some troublesome questions in school districts where voting is restricted to homeowners, or to homeowners and parents. Can the tenant without children object on the ground of lack of equal protection? Can the parent object to the childless homeowner's vote on the ground that a nonuser of the service is exercising control? Can the voter without children object that a non-homeowning parent is not paying for the service while exercising control? While all of these questions are interesting, most courts would probably reject such possible lines of attack out of hand."

This appeal, accordingly, should be rejected "out of hand".

CONCLUSION

This appeal should be dismissed, or in the alternative, the judgment should be affirmed.

Dated: New York, N. Y. August 4, 1968.

Respectfully submitted,

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